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IN THE

Supreme Court of the United States

October Term, 1970
No. 507

JUDITH JAVA, *et al.*,

Appellees,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, *et al.*,

Appellants.

Brief of Southern California Edison Company, et al. as Amici Curiae.

Interest of the Amici Curiae.

Southern California Edison Company, California Metal Enameling Company, Transit Mixed Concrete Company, American Cement Corporation, West Coast Chain Manufacturing Company, and Occidental Life Insurance Company (hereinafter the "Employers") moved unsuccessfully for leave to intervene as defendants in this Court in order that they might participate as formal parties in the appeal and subsequent proceedings in this cause. The formal motion to intervene and the attached affidavits submitted by each company set forth in detail the substantial interest which the Employers, and other California employers, have in this litigation. Because that material is of such significance to the Employers' position in this case, and because it forms the background for the

Employers' brief as *amici curiae*, a portion of that material is reiterated here.

The six *amici curiae* are employers within the State of California, and as such, are subject to the taxing provisions of the California Unemployment Insurance Code. The unemployment insurance taxes paid by employers constitute almost the sole source of income collected in the Unemployment Fund, from which unemployment benefits are disbursed to qualified claimants. Employers have a substantial interest in seeing that excessive amounts are not disbursed from the Fund, for as benefits increase, the employers' unemployment taxes also increase. Section 1328 of the Code provides employers with a procedure for testing the propriety of disbursements by granting an employer the right to challenge the Department's initial determination to pay benefits to a former employee whom the employer believes is ineligible. Section 1335 provides in part that if such an appeal is filed by the employer, the payment of benefits will be suspended pending a final decision on the appeal.[1] The District Court has enjoined the enforcement of that Section, holding that the lack

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[1] "§1335. *Appeal precluding benefit payments; exceptions.* If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:

"(a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issues set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or

"(b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.

"If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination."

of a pre-termination hearing renders the Section constitutionally defective and violates the directive in 42 U.S.C. Section 503(a)(1) that the unemployment insurance program be "reasonably calculated to insure full payment of unemployment compensation when due."

The Employers' interest in this case centers around the substantial financial effect which a decision upholding the District Court's invalidation of Section 1335 could have upon all employers within the state.[2] The affidavits of the Employers attached as Exhibits B through G to the Motion to Intervene demonstrated that should disbursements from the Fund significantly increase, a result which necessarily follows from the District Court's decision, employers could be required to pay taxes based upon a higher taxable wage base and under a higher tax schedule. If both of these bases for computing the Employers' tax rates had been operative in 1969, the Employers' unemployment taxes would have shown an increase over taxes actually paid in 1969 in these amounts: Southern California Edison Co.—93.3%; California Metal Enameling Co.—31.3%; Transit Mixed Concrete Co.—53.2%; American Cement Corp.—62.1%; West Coast Chain Manufacturing Co.—66.8%; Occidental Life Insurance Co. —35.2%.

These figures represent the possible increased financial burden on employers which may result when an increase in disbursements from the Fund causes certain elements in the financing structure for unemploy-

[2]The Court's decision will affect employers across the country; statutory provisions similar to California's Section 1335 are in effect in 48 other states. See Appellant's Jurisdictional Statement at 15-17.

ment insurance to become effective. One of these elements is the taxable wage base (Unemployment Insurance Code Section 930). Whenever total revenues to the Unemployment Fund equal or exceed disbursements, employers pay taxes at the assigned rates on the first $3,800 of each employee's annual earnings. When revenues fall short of disbursements, however, employers pay taxes on the first $4,100 of each employee's wages. Thus, at the average 1969 tax rate of 2.51%, a company would pay a per employee tax ranging from $95.38 to $102.91, depending on the relationship of fund income to outgo.

The second is the balancing account tax (Section 976.5 of the Code). Charges to the balancing account include benefit payments not charged to individual employer's accounts, extended duration payments, and benefits charged against deficit accounts. Credits to the balancing account come mainly from uniform taxes levied on all employers and interest earned by the unemployment funds. The tax rate depends upon the relationship between charges to the account and its credits and ranges from a high of 1.0% to a low of 0.2%. An employer who was not responsible for any charges against the balancing account could be assessed for per employee charges of as much as $41 or as little as $7.60, depending upon the relationship of account charges to credits.

The third element concerns the two experience rating tax schedules (Sections 977 and 978 of the Code). Under these variable schedules, employers are taxed in relation to their experience with unemployment; however, the factor governing the operative schedule is the relationship of the Unemployment Fund to total taxable wages in the state. The high tax schedule is designed

to produce more revenue than the low, so employers with excellent experience pay more taxes whenever the high tax schedule is in effect. For example, an employer with the optimum reserve account ratio would pay at the rate of 0.8% when the high schedule is in effect; under the low schedule, he would be assigned a zero rate.

In their Brief in Opposition to the Employers' Motion to Intervene, the appellees attempted to minimize the financial effect which the District Court's ruling could have on California employers. The Employers submit, first, that an increase in disbursements of $800,000 is not an insignificant amount.[3] Secondly, that argument ignored the broader ramifications of the Court's decision. The Appellees based their conclusions upon the premise that the number of employer appeals and the median six-week delay from appeal to decision will remain constant. In fact, however, those factors are likely to change significantly. It is not speculative to conclude that the number of fraudulent claims will increase as a result of the District Court's

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[3]Payments made to claimants during employer appeals but which are later found to have been improperly made are essentially unrecoverable. Sections 1375-1380 of the Code provide procedures for the recovery of an overpayment, but from a practical standpoint recovery is difficult. Section 1375 is a significant roadblock to recoupment, since it provides that the recipient will be liable for an overpayment unless:

> "(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and
>
> "(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

The difficulties inherent in attempting to prove malfeasance on the part of the recipient, or that recovery would not be against equity and good conscience, and the administrative costs of a proceeding to establish an overpayment militate against the state seeking recovery at all.

decision. Individuals who would not have even applied for unemployment compensation in the past could now seek and on the basis of untrue assertions receive benefits pending an employer appeal. The delay in appeal time caused by these fraudulent claims would of necessity increase concomitantly. A substantial financial impact on employers within the state is clearly within the range of reasonable probability.

This direct financial impact serves to illustrate that employers within the state, rather than the state itself, are the real parties in interest in this litigation. In essence, the state merely serves as an administrator of private funds, disbursing sums from an account completely segregated from ordinary tax revenue. Employers are therefore interested in this litigation, not to assert that qualified claimants should be denied benefits, but to ensure that the employer's unique financial interest is adequately protected. As will be more fully discussed subsequently, the Employers maintain that in weighing whether a claimant has been denied due process of law, the employer's right to due process in the proper administration of his unemployment contributions must also be weighed. Any decision touching upon the right to receive benefits must therefore also include consideration of the employer's right to contest improper disbursements. This brief is filed to present those considerations, and to urge the Court to hold that since the District Court's decision did not take cognizance of the employer's interest, the lower Court's decision should be reversed or at least remanded for further consideration.

ARGUMENT.

I.

The Suspension of Unemployment Insurance Benefits Pending an Employer's Appeal Is Not Violative of Due Process Under the Fourteenth Amendment.

In *Goldberg v. Kelly* (1970), 397 U.S. 254, 25 L. Ed. 287, the Court held that the termination of public assistance payments without offering an evidentiary hearing prior to termination denied the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. In the instant case, the lower Court concluded that Section 1335 of the California Unemployment Insurance Code, which provides that unemployment benefits will not be paid pending an employer's challenge to the initial determination of eligibility, presented a case indistinguishable from *Goldberg*. The Court held that by not providing for a pre-termination hearing, Section 1335 was constitutionally defective and counter to the principles enunciated in *Goldberg*.

The Employers assert that even if it is assumed that Section 1335 "terminates" payments, the decision in *Goldberg* is not dispositive of this case. The principles in *Goldberg* should be restricted to the context of public assistance payments. Unemployment insurance is significantly different from welfare; a decision which affects one should not *ipso facto* affect the other. Thus, in testing whether a procedure under the unemployment insurance structure is constitutionally sufficient, that procedure must be examined in its own light sep-

arate and apart from procedures applicable to any other governmental function. As the Court stated in *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Communications Comm'n v. WJR*, 337 U.S. 265, 275-276; *Hannah v. Larche*, 363 U.S. 420, 440, 442; *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 708-709. '"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions. . . .'"
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> *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-163 (concurring opinion).

> "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstanmes must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. * * *"
>
> *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895.

It is important, first, to briefly examine the nature of unemployment compensation, and to delineate the manner in which it differs from alternative measures for the unemployed, such as public assistance. This is a critical distinction since it is clear that the overriding consideration in *Goldberg* was that the lack of a pre-termination hearing before benefits were halted left the recipients destitute. The cruel circumstances in

which a welfare recipient may find himself when payments are terminated dictated the conclusion that the procedure was defective. These considerations are not pertinent under the unemployment insurance structure, however, as the following summary of distinguishing characteristics between unemployment insurance and welfare points out:

"The first and most generally found distinguishing criterion is that unemployment compensation makes cash payments to unemployed workers as a right under more or less clearly defined conditions which do not include, however, the requirement that the recipient undergo a test of need.

"Second, the amount of the payment is defined in the law in such a way that the worker can determine his benefit beforehand, and its amount is not subject to modification by the exercise of official discretion. The actual amount is a compromise between two often conflicting sets of consideration: the desire not to make a payment that is too close to the sum the worker would normally be expected to secure from employment and the conviction that the benefit should bear some relation to the need of the worker. This system of pre-determined and non-discretionary benefits is in sharp constrast to public assistance, where payments are theoretically based on the budgetary deficiency principle and depend upon the difference between each individual's (or more commonly, family's) estimated budgetary needs and his (or the family's) available resources. The determination of both needs and resources involves considerable discretion on the part of the official ad-

ministrators and always calls for an investigation of the family.

"A third distinguishing characteristic of unemployment insurance as compared with other measures for dealing with income loss due to unemployment is that payments are always limited to persons who are involuntarily unemployed and who have had some attachment to the labor market in some defined period prior to claiming benefit. This period may however, be so short as to be almost insignificant.

"In the fourth place, in unemployment compensation the period for which benefits are payable is defined is the law and is usually, but not always, limited to a perod of less than 52 weeks within a period of a year.

"In the fifth place, some part of the costs of unemployment compensation are normally provided by earmarked taxes paid into a special fund, apart from the general budget. Almost universally, these taxes include payroll taxes paid by employers; usually, except in the typical American law, they include also wage taxes paid by workers, and often, again with the notable exception of the United States, part of the costs are met by a contribution from the general revenues."

E. M. Burns, Unemployment Compensation and Socio-Economic Objectives, 55 Yale L. J. 1, 2-4 (1945).

The first characteristic noted above, that welfare payments are premised on need whereas need is irrelevant in determining eligibility for unemployment bene-

fits, was discounted by the court below. The court held that,

> "Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster stricken that there is someone, somewhere, worse off than he, and this Court finds that the situation of the enemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client [sic] in *Kelly v. Wyman*, 294 F. Supp. 893 (1968), and the garnishee in *Sniadach v. Family Finance Corp. of Bay View, et al.*, 395 U.S. 337 (1969)."
>
> Appellants' Jurisdictional Statement, Appendix A at p. 6.

The District Court's sentiments are laudable but they are not relevant in this case. As compared to the person on welfare, the recipient of unemployment compensation benefits is much more likely to be able to get by for the short period of time required to resolve the issue of his eligibility because of the fact that immediately prior to that time he was earning money at a job. Under the unemployment insurance program, even the wealthy may receive benefits.[4] As one writer has pointed

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[4]Unemployment compensation benefits are based on wages paid during a base period (Section 1275 of the Code). An individual's weekly benefit amount is determined by the amount of wages paid him during the quarter of his base period in which his wages were highest (Section 1280 of the Code). Although an individual who earns less than $720 during his base period cannot establish a valid claim for benefits at all (Section 1281 of the Code), there is no corresponding maximum cutoff, *i.e.*, regardless of how much above $720 one earns, he may nevertheless file a claim. Moreover, if the individual has been

(This footnote is continued on the next page)

out, the committee reports and congressional debates on the Social Security Act of 1935 make clear that the absence of a "means" test as a condition precedent to eligibility,

> "[W]as considered the single most characteristic feature distinguishing unemployment compensation from relief. The requirement that payments be made only 'with respect to unemployment,' if read in light of the principle of social insurance, does prohibit a 'means' test: a payment predicated upon the satisfaction of the 'means' test is made not with respect to 'unemployment,' but with respect to 'needy unemployment.' 'Unemployment' *plus* need, or *plus* the possession of some desirable moral quality or the performance of some laudable act, is an impermissible basis for payments. The congressional purpose to eliminate the 'means' test reinforces what is a natural reading of the federal standard to include the social insurance principal." (Emphasis by the Author.)
>
> Note, Charity Versus Social Insurance in Unemployment Compensation Laws, 73 Yale L.J. 357, 377 (1963)

See:

S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935);

H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935);

79 Cong. Rec. 5468 (1935).

The Report to the President of the Committee on Economic Security (1935) emphasizes the differences

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steadily employed he could receive the maximum benefits allowable. Obviously, then, the more prosperous and steadily employed one is, the more likely he is to receive benefits, and possibly the maximum amount of benefits as well.

between unemployment benefits and welfare. The Committee noted that unemployment benefits could be paid only for periods of time which, to many people, would seem short, and that:

"The benefits are small, although considerably higher on the average than relief grants. While unemployment compensation is far from being a complete protection, *it is a valuable first line of defense for the largest group in our population, the industrial workers ordinarily steadily employed.* Unemployment compensation should permit such a worker, who becomes unemployed, to draw a cash benefit for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means test. Normally the insured worker will return to his old job or find other work before his right to benefits is exhausted. If he does not find work, we recommend that his further period of unemployment should be met by a work benefit, as described in the section of this report dealing with employment assurance. This correlation between the cash benefit and the work benefit is recommended, and it seems to us that the combination is both fair and desirable. It will carry workers over most, if not all, periods of unemployment in normal times, without resort to any other form of assistance. While the maximum benefit periods indicated by the actuarial calculations are short in relation to the unemployment suffered by the people now on relief, it must be remembered that in ordinary industrial periods the great majority of workers who become unemployed find other work in a much shorter time." (Emphasis added.)

Report to the President of the Committee on Economic Security (1935) pp. 13-14.

The Report clearly shows that the likelihood that an unemployed person might have to turn to another form of economic assistance was contemplated by the Committee and accepted as an economic reality. By recommending to the President that a national unemployment insurance program be established, the Committee was not recommending simply another form of welfare. Carried to its logical extreme, however, the lower court's reasoning in the instant case would convert the California unemployment insurance program into welfare. If in enacting the Social Security Act Congress chose not to create dual welfare programs, that result should not be permitted by judicial decision.

Need was the critical factor in the determination of the procedural due process question in both the District Court and Supreme Court decisions in *Goldberg*. The District Court agreed with the state that the New York post-termination hearing procedure was constitutionally sufficient, but went on to hold that:

> "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. * * *"
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> *Kelly v. Wyman* (S.D.N.Y. 1968), 294 F. Supp. 893, 899.

The court recounted in detail the plight of the terminated recipients and concluded that:

> "Suffice it to say that to cut off a welfare recipient in the face of this kind of 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. * * *
>
> * * * *

"Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, . . ."

Kelly v. Wyman, 294 F. Supp. 893, 900-901.

This Court's opinion affirming the District Court's decision in *Kelly* equally emphasizes that the element of need present in the welfare context necessitated a holding that pre-termination procedures were required:

"[W]e agree with the District Court that when welfare is discontinued, only a pretermination evidentiary hearing provides the recipient with procedural due process. Cf. Sniadach v. Family Finance Corporation, 395 U.S. 337, 23 L.Ed.2d 349, 89 SCt 1820 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239, 19 L Ed 2d 438, 442, 88 S Ct 362 (1967). Thus the crucial factor in this context —a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental largesse is ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." (Emphasis by the Court.)

Goldberg v. Kelly, 25 L. Ed. 2d 287, 297.

Hardship to the welfare recipient whose payments are terminated has consistently been the underlying consideration supporting arguments favoring pre-termination hearings. *See,* Comment, The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing, 68 Mich.L.Rev. 112 (1969); Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967).

Were the element of need extracted from the *Goldberg* situation, it is clear that post-termination procedures would have satisfied procedural due process. In the instant case, where the element of need is not a pertinent consideration, the California procedure similarly should be held to satisfy procedural due process. The District Court's holding that the appellees' position "is every bit as lamentable from the legal standpoint as that of the welfare client" misconstrues the purposes and structure of the unemployment insurance program.

The Employers do not maintain that procedural due process is inapplicable to the termination of unemployment benefits. The Court has expressly held that such benefits are protectible rights, *Sherbert v. Verner* (1963), 374 U.S. 398, and that the termination of those rights touches on significant constitutional questions. The Employers do contend, however, that the present hearing procedures are fully adequate to guarantee procedural due process.[5]

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[5]Section 303(a)(3) of the Social Security Act of 1935, 42 U.S.C. Section 503(a)(3), provides that:

"The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such

II.

The Interest of the Employer Should Be Balanced Against the Interest of the Unemployment Insurance Claimant.

Assuming *arguendo* that a hearing prior to withholding payments may be desirable, the Employers assert that their interest presents significant considerations outweighing the need for such a hearing.

In *Kelly v. Wyman* (S.D.N.Y. 1968), 294 F. Supp. 893, the District Court noted that welfare programs in the United States fall into two groups: general assistance, financed only by state and local governments, and categorical assistance, financed by the federal government. This Court held in *Goldberg* that the state's interest in conserving these public funds did not constitute an interest substantial enough in the welfare context to override the recipient's interest in uninterrupted receipt of public assistance. The Court agreed with the

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State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

"* * *

"(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied. . . ." (42 U.S.C. §503(a)(3)).

The section is comparable to a provision in the Aid to Families with Dependent Children portion of the Act, 42 U.S.C. Section 601 *et seq.*, which was under consideration in *Goldberg*. That section provides that:

"(a) A State plan for aid and services to needy families with children must . . . (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness. . . ." (42 U.S.C. § 602(a)(4)).

If the New York Statute designed to satisfy the latter section would have satisfied procedural due process in the absence of evidence of "brutal need." *Goldberg, supra,* the former section, which does not relate to need, should be constitutionally sufficient.

District Court that "the stakes are simply too high for the welfare recipient" to permit the governmental interest to outweigh the recipient's interest.

In sharp contrast to *Goldberg*, in the instant case the public purse in not involved. As the discussion in the section describing the interest of the *amici curiae* points out, the only individuals or entities affected by increased disbursements from the Unemployment Fund are employers within the state. And it was shown that the effect a decision upholding the District Court will have on the employers' interest could be substantial.

Although the facts before the court below concerned cases in which an employer appeals in initial determination of eligibility, the ramifications of the decision that the instant case is indistinguishable from *Goldberg* could be much more far-reaching. Since there are many instances in which unemployment benefits are currently withheld without a prior hearing, a decision that hearings of this sort are required in each case could have a disastrous financial effect on employers, as well as signal the end of the present unemployment insurance structure. The following categories exemplify instances in which payments are withheld prior to a hearing before a referee of the Unemployment Insurance Appeals Board.

> (a) A claimant not in claim status who is determined to be monetarily eligible for benefits and is not disqualified for reasons relating to his separation from his last employment may be disqualified without a hearing for being unavailable for work, for refusing suitable work, or for failing to seek work in the first week of a benefit series (Code, Sections 1253, 1257(b)).

(b) A claimant who is held initially eligible on a separation issue may be disqualified when the employer's appeal raises new facts which causes the department to redetermine the issue (Code, Section 1253.1(d)). In this situation the claimant receives one payment of benefits pursuant to the determination of eligibility. The department's statutory authority to redetermine the issue within 15 days in effect nullifies the determination of eligibility and holds the claimant disqualified from the beginning. Thereafter the claimant may appeal, but he is not paid benefits pending such appeal. The constitutionality of withholding benefits in this situation was challenged in the case of *Maria Covaciu v. Gilbert Sheffield* (Los Angeles County Superior Court 983-309). On October 22, 1970, the court denied the plaintiff's petition for writ of mandate, thus upholding the department's practice in this situation. However, a similar issue is under consideration by the United States District Court for the Southern District of New York in the case of *Torres v. New York Department of Labor et al.*, 70 CIV 2408. In that case, the plaintiffs were initially determined eligible and were paid, but were disqualified retroactively for voluntarily leaving their last employment and for willfully making false statements. On September 14, 1970 the U.S. District Court convened a three-judge court to consider the constitutionality of the retroactive disqualification without a prior hearing.

(c) A claimant who is initially disqualified by the department on a separation issue may appeal to a referee, who may in turn reverse the deter-

mination and hold the claimant eligible for benefits. However, the department withholds the payment of benefits if the employer appeals further to the full Unemployment Insurance Appeals Board (Code, Sections 1334, 1335). This factual situation brings into focus the position of the department in the instant case that the decision of eligibility, whether by a department interviewer or a referee, is not binding or enforceable so long as it is subject to further appeal.

(d) A claimant may be held eligible on a separation issue and draw benefits for a period of time. If thereafter a question of his eligibility for benefits with respect to a particular week arises, the claimant will be referred to a determinations interviewer for a resolution of the issue (See Code, Section 1253). California withholds benefits to the claimant until such issue is resolved in the claimant's favor.

(e) A claimant currently in claim status may be disqualified for a particular week for being in receipt of wages, for being unavailable for work, for refusing suitable work, or for failing to seek work (Code, Sections 1252, 1253, 1257). Under California law and procedure such a disqualification is effective immediately and benefits are withheld pending the claimant's appeal to a referee. A Federal District Court for the Northern District of California in *Crow v. Schultz* (C-70 1128 SAW) granted the plaintiff's motion for summary judgment on October 12, 1970 holding that *Goldberg* applies to unemployment insurance so as to give a claimant the right to an evidentiary hearing when an individual "is deprived of a statutory

pension which he has previously enjoyed due to an adverse finding where factual issues are in dispute, and where the agency concerned has acted upon third party information. . . ." The decision has been stayed until January 23, 1971.

(f) A claimant in claim status who is found eligible for benefits for a particular week may have benefits withheld either because the department determines that the claimant is liable to repay a prior overpayment or for investigation of a possible overpayment (Code, Section 1375 et seq.). California law provides that the department may offset benefits currently due in order to satisfy a previously established overpayment (Code, Section 1379(b)). While the overpayment is being considered, the department withholds the payment of benefits to protect its right to offset.

(g) A claimant in claim status who is held eligible for benefits for a particular week may have benefits withheld because the department has filed a criminal complaint against the claimant as the result of an alleged act of fraud committed in the past. Section 1263(c) of the Code specifically provides that the department shall suspend the payment of benefits to an individual effective upon the date of the filing of a criminal complaint against him. The Code further specifies that an individual convicted of making a false statement to obtain benefits is disqualified for 52 weeks commencing in the week in which the criminal complaint was filed.

If in each of the foregoing instances a pre-termination hearing were required, the drain on the Unem-

ployment Fund could increase significantly. At the other end of the spectrum, of course, is the possibility of establishing pre-eligibility hearings. But although this type hearing would certainly comport with procedural due process and conserve the Fund, the great majority of unemployment insurance claimants would suffer.[6] Between these two conflicting possibilities is the present structure, which adequately safeguards both the majority of claimants and the employers' financial interest. A decision tipping the scale toward unnecessary pre-termination hearings could increase the employers' unemployment contributions by a significant amount, yet fail to substantially better the position of the vast majority of claimants.

III.

Section 1335 Conforms to the Requirement That the State Program Be Reasonably Calculated to Insure Full Payments of Benefits When Due.

The court below compared the California procedure for determining eligibility and commencing payments to unemployment insurance claimants against the direc-

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[6]This would be an impossibility in any case, since in calendar year 1968, there were 960,180 claims for unemployment benefits filed. See Affidavit of George Roche, Appellee's Brief in Opposition to Motion to Intervene, Exhibit B.

Moreover, eligibility is determined on a weekly basis (Section 1253 of the Code). In 1969, of 404,930 determinations made disqualifying claimants from receiving benefits, 152,261 determinations were made disqualifying claimants in "claim status", *i.e.*, in the process of filing a weekly claim for benefits. Affidavit of Nicolo Pinto, Appellants' Jurisdiction Statement, Appendix C. If a hearing were required before halting payments to these claimants, the Department would have had to hold approximately 418 hearings every day of the year, including Saturdays, Sundays, and holidays. See also the Brief of the State of New York on *Amicus Curiae* in Support of the Jurisdictional Statement where it is noted on page 5 that in New York in 1969, some 7,880,000 weeks of benefits were paid.

tive of 42 U.S.C. Section 503(c)(1) that the program "be reasonably calculated to insure full payment of unemployment compensation when due. . . ." The court concluded that the initial determination by the eligibility interviewer marked the critical point in the California procedure, and that payments become "due" within the meaning of Section 503(a)(1) upon an affirmative determination by the interviewer.

The Employers have shown that even if payments are in fact "due" at this point, the subsequent termination of those payments without a prior hearing is not violative of procedural due process. See Part I, *supra.* The state and the Employers do not in any sense agree, however, that payments are "due" after the initial determination. The state and the Employers assert that payments are not due, *i.e.,* the obligation to pay benefits is not fixed, until an employer's appeal has been determined. As a matter of semantics alone, benefits cannot be "due" at a particular time when there is a substantial question of whether it is a fixed obligation.

In its decision granting the appellees' Motion for Preliminary Injunction, the District Court explored the Department's practice for determining a claimant's eligibility for benefits. That practice, contained in a stipulation submitted by the parties, reflects several stages at which the claimant and his previous employer may submit information bearing on the claimant's eligibility. After progressing through these stages, the interviewer makes an eligibility determination. The District Court rejected the appellants' argument that that determination was merely preliminary, holding that the argument "flies in the face of" actual Department practice. But the court's conclusion ignores the distinction between what is actually ***required*** and what may be current

Department practice. The Employers submit that until they have had a full opportunity to refute a former employee's claim, there is no obligation on the Department to commence payments at all. This is implicit in the language of Section 1335. See note 1, *supra*. From a practical standpoint, however, it is not unreasonable for the Department to begin payments immediately, since in 98% of the cases no employer appeal is filed. The Department's practice reflects simple administrative expediency. A decision by this Court that payments are "due" upon the initial determination of eligibility could lead to a revision in the current practice such that a more formal determination would not be made, and benefits not paid, until the employer's ten-day period in which to appeal has expired.[7] This would, of course, deny one or two benefit payments to 98% of all claimants, whereas under the current practice, only 2% of all claimants have payments withheld after *receiving* one or two payments. The present practice is generous to the vast majority of unemployment insurance claimants, fair to the employer, and administratively sound. To follow the appellees' argument that benefits be payable immediately and before an employee's appeal is heard would upset the balance currently struck be-

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[7]It would also be a simple matter to extend the waiting period for the commencement of payments from the current one-week period to a longer period. See Section 1253(d) of the Code. The states are granted freedom under the Social Security Act of 1935 to determine their own waiting periods. *See* Report to the President on Economic Security (1935), *infra*. The fact that the state could have all claimants wait for any payment until the employer appeal period expired and thereby avoid having what could be termed a "termination" of benefits indicates the insubstantiality of the appellees' argument that they are entitled to a "pre-termination" hearing. Procedural due process in this case surely cannot depend on whether California continues its present practice or makes everyone wait a ten-day period before commencing payments.

tween the claimants' and the employers' interests, and could result in either administrative chaos or the loss of some payments of benefits to the other 98% of all claimants.

The Employers contend that a full opportunity for their arguments against a claim to be heard is necessarily within the mainstream of the determination process. Until that time, the interviewer has seen only the claimant personally; the claimant has in all probability established a rapport with the interviewer which the employer does not have. An employer appeal, where the employer's arguments may be fully heard, is necessary in order that the conflicting positions of the claimant and the employer may be resolved in an atmosphere in which the parties are on a more equal footing. To hold that payments are "due" before the employer has had a full opportunity to be heard would deny employers of their unemployment insurance contributions without due process of law.

Even if it were assumed that payments are generally "due" upon the initial determination, Section 1335 nevertheless comports with the requirement of Section 503(a)-(1). This is shown by the following discussion of the crux of the "when due" requirement—a point largely bypassed by the District Court. That point is whether the *program* is *reasonably calculated* to assure full payment when due.[8] It is clear that the California

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[8]That the District Court based its conclusion on an improperly narrow ground, rather than on the "reasonably calculated" principle of Section 503(a)(1) is illustrated by the following quote, where the court ignored the phrase "reasonably calculated" altogether:

"This was certainly the primary reason for 42 U.S.C. § 503 (a)(1) and the requirement that state programs assure full payments 'when due. . . .' [I]t is clear that as to these people,

(This footnote is continued on the next page)

program is designed to comport with that requirement, and that it does so with commendable effectiveness. The provision in Section 1335 which suspends payments pending an employer appeal does, of course, leave open the possibility that some eligible claimants will have benefits withheld for a short period. But the number of claimants whose benefits are deferred is so small that it must be concluded that the program is reasonably calculated to assure payments when due. This is borne out by the fact that of 401,917 issues of eligibility determined favorably to the claimant in 1968, in only 5,526 cases were employer appeals filed. Of those appeals, the determination of eligibility was upheld in 2,924 cases. These figures show that in effect approximately 1% of eligible claimants ever have benefits withheld under Section 1335, as well as illustrate that employer appeals are taken in good faith.[9] Although the legislative history of the Social Security Act does not reveal the authors' meaning of "reasonably calculated", it is apparent that they did not contemplate providing immediate payment to all. The Report to the President of the Commitee on Economic Security (1935), illustrates that federal controls designed to restrict the states to an unnecessary degree were specifically disapproved. The Committee stated that:

> "[T]he Congress can at any time increase the requirements which State laws must fulfill and

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payments are not made 'when due', and the fundamental intent and policy of the Social Security Act are thwarted." (Appellants' Jurisdictional Statement, Appendix A at p. 7).

[9]See Exhibits B—G appended to the Motion of Southern California Edison, *et al.* to Intervene as Defendants.

may, if it sees fit, at some future time, substitute a federally administered system for the cooperative Federal-State system we recommend.

"All things considered, however, we deem it the safest and soundest policy to confine the role of the Federal Government with respect to this problem at this time to removing obstacles to State action, safeguarding and liquidating the reserve funds, and aiding the States with their problems, leaving to them primary responsibility for administration.

* * * *

"The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States. * * *

"The States should have freedom in determining their own waiting periods, benefit rates, maximum benefit periods, etc. * * *"

Rptr. of the Comm. on Econ. Sec. at pp. 16, 20.

These statements indicate that so long as the general tenor and purposes of the Act are followed, the states may administer their programs with relatively unfettered discretion. If, as part of a state program, it is provided that under certain circumstances payments of benefits may be deferred, such a provision should not be considered a *per se* failure to comport with Section 503-(a)(1). The entire program should be examined,

rather than the isolated provision, to determine whether it is reasonably calculated to assure payment when due. In this case, it is clear that the program is effective and meets those requirements. Thus, even assuming that "when due" refers to an initial determination of eligibility, Section 1335 and the California program as a whole meets the "reasonably calculated" test. The fact that the Secretary of Labor has certified the program negates any argument to the contrary. *Cf. Rosado v. Wyman*, 397 U.S. 397 (1970).[10]

Conclusion.

The Employers submit that the District Court entered the injunction in this case on the basis of incomplete facts, and without considering the interest of

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[10]Other states have programs similar to California's; they have been accepted by the Secretary for many years, and have never been questioned. A provision similar to the present California Code Section 1335 appeared as early as 1937. An amendment to the Unemployment Reserves Act, Stats. 1937, Ch. 742, Sec. 67 provided that:

> "Sec. 67 . . . Unless the claimant, such employer, or such other interested persons within 5 calendar days after delivery of such notification, or within 7 calendar days after such notification was mailed to his last known address on file with the Commission, files with the Commission an appeal from the decision of the deputy or referee, such decision of the deputy or referee shall be final and benefits shall be paid or denied in accordance therewith; provided that if a referee affirms a decision of a deputy, or the Commission confirms the decision of a referee allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed no employer's account shall be charged with the benefits so paid as to which the decision was reversed."

The foregoing quotation from the predecessor of Section 1335 also serves to more clearly show that the interviewer's determination was not intended to be final, *i.e.*, payments were not "due", until either the time for filing an appeal had expired, or until the appeal was decided favorably to the claimant.

the Employers and the Secretary of Labor. The Employers therefore urge that the decision of the District Court be reversed or remanded in order that these interests may be adequately presented.

Dated: Dec. 8, 1970.

Respectfully submitted,

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